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No. 95-608 (3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

FRED STANTON SMITH, individually and as Trustee of the MIAMI CENTER LIQUIDATING TRUST; THE BANK OF NEW YORK; THE CITY NATIONAL BANK OF MIAMI, as trustee under Land Trust #5008793; M. C. HOLDINGS PARTNERS, a New York General Partnership, and its General Partners, namely, ROBANK CORPORATION, H. D. LIQUIDATION, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORPORATION, AMERICAN SECURITY LTD., and M. CENTER CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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QUESTION PRESENTED

Whether the court of appeals, district court, and bankruptcy court correctly denied the Petitioners' motion to vacate, on the basis of Fed. R. Civ. P. 60(b)(5), a bankruptcy court order entered over seven years ago?

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STATEMENT OF JURISDICTION

The Petitioners assert that jurisdiction exists under 28 U.S.C. § 1254(1).

No jurisdiction exists, however, as the Petitioners have failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuit courts of appeal. Sup. Ct. R. 10.1(a) through (c); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991).

STATEMENT OF THE CASE

INTRODUCTION

This case and a companion petition for *mandamus* (Case No. 95-625) are the thirteenth and fourteenth attempts by five debtors in consolidated bankruptcy proceedings – commenced voluntarily by the debtors in 1984 – to delay and disrupt the closing of the cases.[1]

The Petitioners have commenced and prosecuted, unsuccessfully in each instance, over 30

[1] Of the 12 prior petitions to this Court, 11 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed; *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court.

appeals to the court of appeals, and over 80 appeals in the district court, in the ten years since a creditors' plan of reorganization was confirmed.

The present Petition is also frivolous.[2]

The Petitioners were debtors in five consolidated bankruptcy cases commenced in 1984. In 1985, Respondent, The Bank of New York ("Bank"),[3] filed a plan of reorganization (the "Plan") which was approved by the creditors and confirmed by the bankruptcy court. *In re Holywell Corp.*, 54 B.R. 41 (Bankr. S.D. Fla. 1985). The district court affirmed the confirmation order. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The court of appeals held that further appeals were moot, because the Plan had been substantially consummated, and this Court denied *certiorari. Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. den.*, 488 U.S. 823 (1988).

The cases involved approximately 400 claims, exceeding $350 million; the Bank's mortgage claim of approximately $240 million predominated. The Plan

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[2] The Petitioners have been held in contempt repeatedly for attempting to relitigate previously-decided issues, and for attempts to circumvent bankruptcy court rulings. *See, e.g., In Re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

[3] The Bank submits this brief on its own behalf and on behalf of all other respondents except the Liquidating Trustee, Mr. Smith. The other eight respondents are affiliates or participants in the lending group that advanced approximately $200 million for the construction of the Miami office and hotel complex developed by the debtors.

provided that a Liquidating Trustee (a Respondent here) would liquidate the assets of the debtor/Petitioners to pay allowed claims, and then turn over any residual money or property to the debtors.

After a series of losses in the bankruptcy court, the Petitioners tried to circumvent the Florida bankruptcy court by filing lawsuits against the Bank and the Trustee in Virginia and in the state court in Florida.

The Virginia lawsuit culminated in a summary judgment in favor of the Bank and the Trustee; the bankruptcy court in Florida then imposed some $138,000 in sanctions against the Petitioners and their counsel.[4]

The state court lawsuit in Florida was removed by the Respondents to the Florida bankruptcy court, which promptly dismissed the lawsuit. The Petitioners appealed to the district court (which affirmed[5]) and the court of appeals (which affirmed[6]) and sought *certiorari* (which was not granted) here; 493 U.S. 1057 (1990).

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[4] *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

[5] *In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988); Petitioners' App. 11a.

[6] *Miami Center v. Bank of New York*, 881 F.2d 1086 (11th Cir. 1989).

THE TAX CASE

The prior proceedings in this Court involved the duties of the Liquidating Trustee under the Plan with respect to (a) federal income tax returns and (b) the payment of any taxes due according to such returns.

The Trustee filed an action for declaratory judgment in the bankruptcy court seeking to resolve these issues. The bankruptcy court, district court, and court of appeals concluded that the Trustee was not responsible for the filing of any such returns or the payment of any such taxes.[7]

This Court reversed, approving the position of the Solicitor General and Internal Revenue Service ("IRS") that the Trustee and Plan were subject to 26 U.S.C. § 6012(b). *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). This Court did not in any way suggest that the confirmation order should be revoked or that the Plan should be rescinded.

On remand, the Trustee and the IRS settled the income tax claims for approximately $13.3 million, and the bankruptcy court approved the settlement. The settlement funds were paid. The Trustee obtained a determination that the Bank, as indemnitor and Plan proponent, was liable to the Trustee for the tax liabilities,[8] and the Trustee and Bank then settled those issues with the approval of the bankruptcy court. The district court affirmed the approval

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[7] *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990).

[8] *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993).

of the settlement when the debtor/Petitioners filed their inevitable appeal.

Following this Court's 1992 opinion in the tax case, the debtor/Petitioners also filed claims in the bankruptcy court seeking damages from the Trustee and the Bank regarding the confirmation and administration of the Plan (including the income tax issues). After a trial on the merits, the bankruptcy court ruled in favor of the Bank and the Trustee on all of the Petitioners' claims; the district court affirmed.[9]

THE RULE 60(b) ATTACK

The debtor/Petitioners also decided that this Court's 1992 tax opinion and an unrelated 1990 decision by the court of appeals[10] should provide a basis for attempting to re-open all of the Petitioners' failed lawsuits and unsuccessful appeals attacking the Plan over the preceding eight years.

To that end, the Petitioners filed a motion under Bankruptcy Rule 9024 (which adopts Fed. R. Civ. P. 60(b)), Petitioners' App. 26a, asking the bankruptcy court to vacate the 1988 order dismissing a lawsuit against the Trustee and the Bank. The motion was denied by the bankruptcy court (Petitioners' App.

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[9] The bankruptcy and district court opinions are unreported. The debtor/Petitioners' further appeals are now pending in the Eleventh Circuit.

[10] *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990).

9a). The district court affirmed (Petitioners' App. 3a), as did the court of appeals (*Id.*, 1a).

This Petition followed.

SUMMARY OF ARGUMENT

Fed. R. Civ. P. 60(b)(5) does not apply here, because the Petitioners have already asserted and reasserted their "failure to provide for income tax" claims against the Trustee and the Bank, and have lost. The district court has affirmed, and the Petitioners' further appeal now pends in the court of appeals.[11]

The bankruptcy court, district court, and court of appeals correctly determined that (a) the Petitioners' motion did not present a proper basis for reopening the 1988 rulings, and (b) the Petitioners' motion was not filed within the "reasonable time" contemplated by Rule 60.

None of these rulings presents an appropriate case for the extraordinary relief sought here and in Case No. 95-625 (*mandamus*); these cases do not present any constitutional issue, important federal question, or a conflict among the circuits.

Accordingly, the Petition should be denied.

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[11] Eleventh Circuit Cases No. 94-4818 and 95-4212 (consolidated).

ARGUMENT

I. THE BANKRUPTCY COURT, DISTRICT COURT, AND COURT OF APPEALS DID NOT COMMIT ERROR

A. The Petitioners Re-Asserted Their Claims After This Court's 1992 Opinion, And Lost

After this Court's 1992 decision in *Holywell Corp. v. Smith*, 503 U.S. 47 (1992), the Trustee's adversary proceeding regarding the income taxes was remanded to the bankruptcy court. The Petitioners filed cross-claims against the Bank and a counter-claim against the Trustee, alleging the same tax-related matters as had been asserted in the unsuccessful 1987 state court lawsuit. The Petitioners' claims were tried in June, 1993, and in September, 1993 the bankruptcy court ruled against the Petitioners in all respects.[12]

As the district court noted (Petitioners' App. 6a), "the bankruptcy court specifically addressed the Supreme Court decision and found there is no basis for [Petitioners'] claims against the Trustee or the Bank in light of the Supreme Court decision."

In short, even if the lower courts or this Court vacated the 1988 ruling insofar as it related to the federal income tax issue – the only issue affected by this Court's 1992 ruling – further litigation would be

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[12] The opinion is unreported, but is reprinted at pages 18 through 40 of the Petitioners' appendix to the companion *mandamus* petition, Case No. 95-625.

precluded as a result of the bankruptcy court's decision on the merits in 1993. That ruling was appealed by the Debtors to the district court, which affirmed, and thereafter to the Eleventh Circuit, where it is presently pending.

B. The Lower Courts Did Not Abuse Their Discretion

The standard for the review of a judicial determination applying Rule 60(b)(5) is the "abuse of discretion" standard. 11 Wright and Miller, Fed. Practice and Pro.: Civil § 2857 (1995). This Court does not exist to review for a third time the bankruptcy court's exercise of discretion already reviewed twice by the district court and court of appeals.

II. THE PETITIONERS' MOTION WAS UNTIMELY

The district court also held, as an alternative basis for its decision, that the Petitioners' motion was untimely (Petitioners' App. 7a). This Court's tax opinion was rendered on February 25, 1992, but the Petitioners did not file their motion until April, 1993. The Petitioners have not shown that this determination by the district court was an abuse of discretion.

CONCLUSION

The pending appeals by the Petitioners in the court of appeals are an adequate vehicle for the Petitioners to pursue their claims that the bankruptcy court in 1993 misapplied this Court's 1992 income tax decision.

None of the appropriate grounds for *certiorari* (much less *mandamus*, in Case No. 95-625) are present. The three lower courts – five experienced federal judges – ruled correctly and unanimously.

For all these reasons, it is respectfully submitted that the writ should be denied.

Respectfully submitted,

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